> [A] suit for damages attributable to an allegedly unreasonable search may lie even if the challenged search produced evidence that was introduced in a state criminal trial resulting in the *§ 1983* plaintiff's still-outstanding conviction. Because of doctrines like independent source and inevitable discovery and especially harmless error, such a *§ 1983* action, even if successful, would not *necessarily* imply that the plaintiff's conviction was unlawful.
>
> [512 U.S. at 487 n. 7 (citations omitted)].

Circuit courts addressing the issue agree that footnote seven pertains not only to Fourth Amendment claims of unlawful seizure, but also to similar *§ 1983* claims that would, if successful, result in suppression of evidence at the criminal trial rather than outright dismissal of the criminal charges. The conflict dividing the courts and the majority and dissenting opinions below arises from differing interpretations of how footnote seven should be construed.

Some courts, and the dissenting opinion below, construe footnote seven to hold that accrual is never delayed solely because the alleged constitutional violation led to the discovery of evidence used to convict the plaintiff at his or her criminal trial. Other courts, and the majority opinion below, construe footnote seven to hold that whether accrual is delayed on this basis depends upon a fact-based inquiry to determine whether doctrines such as independent source, inevitable discovery, or harmless error would serve to remedy the introduction of the allegedly tainted evidence at the plaintiff's criminal trial. In New Jersey, a variance between federal and state-court decisions means that plaintiffs may forum-shop to utilize the court, federal or state, that will allow their claims to proceed. Petitioners' contention that accrual is never delayed in these

circumstances is supported by policy and comity considerations and by recent statements of this Court affording footnote seven an expansive construction.

The first question presented raises this accrual issue in the Fourth Amendment context and asks whether accrual is delayed because a *§ 1983* plaintiff's claim of unlawful search, if successful, would imply the taint of evidence used to convict the plaintiff at his or her criminal trial. Petitioners' contention that accrual is never delayed solely on this basis is additionally supported by recent decisions of this Court suggesting that the delayed-accrual rule does not apply to claims like Fourth Amendment claims of unlawful search that are not cognizable in habeas corpus. The first question presented affords this Court the opportunity to clarify *Heck*'s footnote seven when it pertains to *§ 1983* claims that are not cognizable in habeas corpus.

The second question presented raises the accrual issue in the Equal Protection context and asks whether accrual is delayed because a *§ 1983* plaintiff's claim of selective enforcement, if successful, would imply the taint of evidence used to convict the plaintiff at his or her criminal trial. Persons found with drugs or other inculpatory evidence as the result of vehicular stops often invoke the Equal Protection Clause to seek outright dismissal of criminal charges or the lesser sanction of suppression of evidence derived from the vehicular stops which they claim to be tainted by discriminatory selective enforcement of traffic laws. This Court in *United States v. Armstrong*, 517 U.S. 456, 461 n. 2 (1996), left open as an unresolved issue "whether dismissal of the indictment, or some other sanction, is the proper remedy if a court determines that a defendant has been the victim of [selective] prosecution on the basis of his race." *Id.*, at 461 n. 2. The second question presented includes the related subsidiary but simpler issue of whether any sanction greater than suppression is proper when discriminatory selective enforcement of the laws leads to the discovery of inculpatory evidence.

The decision of the Third Circuit below - that dismissal is the proper sanction - is at variance with the decisions of other courts and creates a conflict between the federal and state courts within New Jersey. The Supreme Court of New Jersey has held that suppression is the proper sanction. Petitioners argue herein that no sanction greater than suppression is proper, and application of *Heck*'s delayed-accrual rule to selective enforcement claims therefore hinges upon the appropriate construction of *Heck*'s footnote seven, albeit as applied to Equal Protection rather than Fourth Amendment claims.

Moreover, petitioners have not argued and do not argue that Equal Protection selective-enforcement claims are not cognizable in habeas corpus. The second question presented affords this Court the opportunity to resolve the circuit split in construing *Heck*'s footnote seven for *§ 1983* claims as to which the absence of habeas corpus relief cannot independently bar *Heck*'s delayed accrual.

A. Factual Background

Respondent Emory E. Gibson, Jr., is an African-American male. (App., *infra*, 3a). On October 28, 1992, petitioners Pennypacker and Reilly, both New Jersey State Troopers, stopped the vehicle in which Gibson was traveling as a passenger. (App., *infra*, 3a). A search of the vehicle uncovered a controlled dangerous substance which resulted in respondent Gibson's arrest, charge and conviction on a drug-related offense. (App., *infra*, 3a-4a).

According to respondent Gibson's complaint, petitioners Pennypacker and Reilly lacked reasonable suspicion to stop the vehicle and probable cause to conduct the search. (App., *infra*, 96a). Moreover, respondent Gibson alleged that the vehicular stop was the result of "racial profiling," that is, selective enforcement of the traffic laws against racial minorities premised upon petitioners' belief that minorities would more likely be in violation of drug laws and upon petitioners' racially discriminatory purpose to enforce the drug laws more

vigorously against minorities than against others. (App., *infra*, 88a-90a). Respondent Gibson's complaint did not allege that petitioners failed to bring drug charges against any similarly situated non-minority person in whose possession illegal drugs were found.

Respondent Gibson was sentenced to fifty years in prison. (App., *infra*, 4a). Ten years after the vehicular stop, and eight years after he was sentenced to prison, the Superior Court of New Jersey vacated respondent Gibson's conviction and dismissed the indictment against him. (App., *infra*, 111a-112a). The State of New Jersey moved for this relief in respondent Gibson's case and in 85 other cases because it could be argued, and a conclusion could be reached by the criminal court, that colorable issues of racial profiling were present in the vehicular stops. (App., *infra*, 34a, 109a-110a).

Within a two-year period following the vacation of his conviction, respondent Gibson filed this action against petitioners pursuant *§ 1983* alleging *inter alia*: (1) that his Fourth Amendment rights were violated by the stop of the vehicle, search, and arrest without probable cause or reasonable suspicion; and (2) that, as a victim of racial profiling, he was subjected to racially selective law-enforcement practices violating his Equal Protection rights. (App., *infra*, 4a-6a). He also alleged derivative conspiracy claims pursuant to *§§ 1983* and *1985* based upon these allegations. (App., *infra*, 6a). Jurisdiction was predicated on 28 U.S.C. *§§ 1331* and *1343(1), (3)* and *(4)*. (App., *infra*, 85a).

B. District Court Proceedings

In the district court, petitioners moved pursuant to *Fed. R. Civ. P. 12(b)(6)* to dismiss respondent Gibson's complaint. (App., *infra*, 5a). Petitioners argued, *inter alia*, that respondent Gibson's Fourth Amendment unlawful search and seizure claims and his Fourteenth Amendment selective enforcement and conspiracy claims were barred by the statute of limitations. (App., *infra*, 5a). The district court granted the petitioners'

motion (and another motion not relevant to this petition filed by petitioners and other defendants claiming qualified immunity and other bases for relief) and dismissed the entire complaint with prejudice. (App., *infra*, 5a).

In dismissing respondent Gibson's Fourth Amendment claims as time-barred, the district court held that these claims accrued on the date of the vehicular stop and not on the date respondent Gibson's conviction was overturned. (App., *infra*, 64a). The court concluded that the Fourth Amendment claim, if successful, would result only in the suppression of evidence and thus did not invoke the delayed-accrual rule. (App., *infra*, 62a-64a). Further, while noting that circuit courts were split on the issue, the district court concluded that footnote seven of *Heck* did not require a fact-based inquiry to determine whether the accrual of the cause of action was delayed. (App., *infra*, 62a-63a, n. 5).

The district court also held that respondent Gibson's Fourteenth Amendment selective enforcement claim (and conspiracy claims) accrued on the date of the vehicular stop. (App., *infra*, 66a-67a). The court reasoned that these claims, if successful, would have warranted only the suppression of the seized evidence. (App., *infra*, 66a). The court concluded that because a successful judgment in a *§ 1983* claim for selective enforcement alone would have no effect on respondent Gibson's conviction or confinement, the accrual of his selective enforcement claims was not delayed. (App., *infra*, 66a-67a).

C. The Court of Appeals Decision

The Third Circuit affirmed the district court judgment except insofar as it dismissed the Fourth Amendment and Equal Protection claims and pendent state law claims. (App., *infra*, 32a). The court reversed the dismissal of the Fourth Amendment claims in a 2-1 opinion. (App., *infra*, 33a). The majority opinion held that in determining the application of *Heck* to a *§ 1983* Fourth Amendment claim which, if successful, would have required the suppression of evidence

seized, the district court must conduct a fact-based inquiry to determine whether doctrines such as independent source, inevitable discovery, or harmless error would have remedied the introduction of the tainted evidence. (App., *infra*, 36a-38a). The majority opinion acknowledged the split in the circuits with respect to whether footnote seven of *Heck* requires this inquiry and allied itself with those circuits requiring it. (App., *infra*, 36a-38a). The majority opinion held that respondent Gibson's Fourth Amendment claims were subject to the delayed-accrual rule because Gibson's claims, if successful, would have required suppression of the drugs found at the time of his arrest, without which, in the court's view, the criminal conviction could not stand. (App., *infra*, 43a). As a result, Gibson's claims accrued not on the date of the vehicular stop but on the date his conviction was overturned, and his complaint, filed within two years of the accrual, was timely. (App., *infra*, 44a).

In dissent, Judge Van Antwerpen concluded that the majority misconstrued *Heck*'s footnote seven and that respondent Gibson's Fourth Amendment claims were not subject to delayed accrual. (App., *infra*, 10a-20a). Part of Judge Van Antwerpen's reasoning was that *Heck*'s delayed accrual does not apply to Fourth Amendment claims of unlawful search because this Court's opinion in *Stone v. Powell*, 428 U.S. 465 (1976), places these claims beyond the purview of habeas corpus. (App., *infra*, 16a-18a).

In a unanimous opinion, the court also reversed the dismissal of respondent Gibson's Fourteenth Amendment selective enforcement claim and his conspiracy claims derived from the allegation of selective enforcement. (App., *infra*, 32a). The court held that the sanction for selective enforcement as alleged in Gibson's complaint would have been outright dismissal of the criminal charges. (App., *infra*, 22a). On this reasoning the court held that, independent of *Heck*'s footnote seven, this claim was subject to delayed accrual and accrued on the date Gibson's conviction was overturned. (App., *infra*,

22a). His complaint, filed within two years of the accrual, was therefore timely. (App., *infra*, 22a).

REASONS FOR GRANTING THE WRIT

A. This Court Should Grant the Writ to Resolve the Circuit Split and to Correct Confusion About *Heck*'s Footnote Seven.

The decision below adds to the substantial circuit conflict about a vitally important and frequently recurring issue of federal law that is raised in both of the questions presented: how to apply the *Heck* delayed-accrual rule to a *§ 1983* plaintiff's claim which, if successful, would not automatically imply the invalidity of the plaintiff's conviction or sentence, but would imply the illegality and taint of evidence used to convict the plaintiff at his or her criminal trial. The conflicting opinions, as well as approach taken by the decision below and other courts requiring a fact-based inquiry about the circumstances of the criminal trial (which sometimes occurs long after the alleged constitutional violation) create uncertainty about the date of accrual, which in turn creates uncertainty about the expiration of the statute of limitations. "Few areas of the law stand in greater need of firmly defined, easily applied rules than does the subject of periods of limitations." *Wilson v. Garcia*, 471 U.S. 261, 266 (1985) (quoting *Chardon v. Fumero Soto*, 462 U.S. 650, 667 (1983) (Rehnquist, J., dissenting)). Because *42 U.S.C. § 1983* is a "most important, and ubiquitous, civil rights statute," the "conflict, confusion, and uncertainty" concerning the limitations issue "provide[s] compelling reasons for granting certiorari." *Id.*, at 266.

The conflict arises from differing interpretations of how Heck's footnote seven should be construed. Courts agree that footnote seven pertains not only to the Fourth Amendment claims of unlawful seizure that the footnote explicitly addressed, but also to similar claims that would, if successful,

result in the suppression of evidence at the criminal trial rather than outright dismissal of the criminal charges. *Huftile v. Miccio-Fonseca*, 410 F.3d 1136, 1140-42 (9th Cir. 2005) (applying *Heck*'s footnote seven to due process and equal protection claims); *Apampa v. Layng*, 157 F.3d 1103, 1105 (7th Cir. 1998) (extending *Heck*'s footnote seven to civil claims based upon the federal wiretapping statute), *cert. denied*, 528 U.S. 908 (1999); *Simmons v. O'Brien*, 77 F.3d 1093, 1095 (8th Cir. 1996) (extending footnote seven to Fifth Amendment claims challenging the voluntariness of a confession); *Patterson v. Burge*, 328 F. Supp. 2d 878, 896 (D. Ill. 2004) (same). The conflict arises in applying footnote seven to these claims.

The circuit decisions construing footnote seven fall into two groups. The First, Eighth, Tenth, and Eleventh Circuits hold that accrual is never delayed solely because the alleged constitutional violation led to the discovery of evidence used to convict the plaintiff at his or her criminal trial. *Nieves v. McSweeney*, 241 F.3d 46, 52 (1st Cir. 2001) (holding that claims for false arrest and imprisonment under *§ 1983* accrue at the time of the arrest); *Whitmore v. Harrington*, 204 F.3d 784, 784-85 (8th Cir. 2000) (construing *Heck*'s footnote seven and holding that the claim that an investigative stop is unlawful accrues at the time of the stop); *Simmons v. O'Brien*, 77 F.3d 1093, 1095 (8th Cir. 1996) (extending footnote seven to Fifth Amendment claims challenging the voluntariness of a confession and holding that a Fifth Amendment coerced-confession claim accrues at the time of the confession although the confession was used to convict the plaintiff); *Beck v. City of Muskogee Police Dep't*, 195 F.3d 553, 558-59 & n. 4 (10th Cir. 1999) (disapproving of precedent from other circuits that construe footnote seven to require a fact-based analysis); *Datz v. Kilgore*, 51 F.3d 252, 253 n. 1 (11th Cir. 1995) (construing *Heck*'s footnote seven and holding that an unlawful search claim accrues at the time of the search).

On the other hand, the Second, Fourth, Fifth, Sixth, and Ninth Circuits hold that whether accrual is delayed depends

upon a fact-based inquiry to determine whether doctrines such as independent source, inevitable discovery, or harmless error would serve to remedy the introduction of the allegedly tainted evidence. *Covington v. City of New York*, 171 F.3d 117, 121-24 (2d Cir. 1999) (applying *Heck* to a Fourth Amendment search and seizure claim); *Ballenger v. Owens*, 352 F.3d 842, 845-47 (4th Cir. 2003) (construing *Heck*'s footnote seven and applying *Heck* to a Fourth Amendment search and seizure claim); *Hudson v. Hughes*, 98 F.3d 868, 872 (5th Cir. 1996) (same); *Shamaeizadeh v. Cunigan*, 182 F.3d 391, 395-99 (6th Cir.) (noting the split of authority concerning the proper construction of *Heck*'s footnote seven and adopting the fact-based analysis), *cert. denied*, 528 U.S. 1021 (1999); *Harvey v. Waldron*, 210 F.3d 1008, 1015-16 (9th Cir. 2000) (same); *Huftile v. Miccio-Fonseca*, 410 F.3d 1136, 1140-42 (9th Cir. 2005) (extending *Heck*'s footnote seven to due process and equal protection claims and adhering to precedent requiring a fact-based analysis). The majority opinion below chose to ally itself with these circuits. (App., *infra*, 36a-38a).

The majority opinion below concluded that "the majority of Courts of Appeals have read footnote seven as requiring a fact-based inquiry" (App., *infra*, 37a) and that "the general trend among the Courts of Appeals has been to emp[illegible]y the fact-based approach." (App., *infra*, 38a). The majority opinion is wrong on both scores because it erred in its analysis of decisions of the Seventh, Eighth, Tenth and Eleventh Circuits. The Seventh Circuit has not categorically adopted either approach but has issued conflicting decisions that adopt both approaches, sometimes without distinguishing contrary precedent. Compare *Kramer v. Village of North Fond du Lac*, 384 F.3d 856, 862 (7th Cir. 2004) (construing *Heck*'s footnote seven to hold that the plaintiff's Fourth Amendment claim accrued at the time of the search although his conviction for commercial gambling rested largely upon gambling paraphernalia seized during the search) and *Copus v. City of Edgerton*, 151 F.3d 646, 648-49 (7th Cir. 1998) (construing *Heck*'s footnote seven to hold that Fourth Amendment claims for unlawful searches accrue at the time of the unlawful search,

rather than at the conclusion of any criminal proceeding) with *Gauger v. Hendle*, 349 F.3d 354, 360-62 (7th Cir. 2003) (delaying accrual of Fourth Amendment claim because evidence of the plaintiff's statements was the fruit of the alleged constitutional violation and the plaintiff could not have been convicted without this evidence). The Eighth, Tenth and Eleventh Circuits have not adopted the fact-based approach, and the decisions cited by the majority opinion below in support of its contention that they have (App., *infra*, 37a-38a) do not support this contention. The most recent decision of the Tenth Circuit is *Beck v. City of Muskogee Police Dep't*, 195 F.3d 553, 558-59 & n. 4 (10th Cir. 1999), which disapproved of precedent from other circuits that require a fact-based approach. Unpublished decisions of the Eighth and Eleventh Circuits issued after the decisions of these courts upon which the majority opinion below relied in support of its contention that these circuits have utilized the fact-based approach discredit that reliance by continuing to eschew the fact-based approach. *Parker v. Matthews*, 71 Fed. Appx. 613, 614, 2003 U.S. App. LEXIS 16913, at *3 (8th Cir. 2003) (unreported) (reaffirming prior Eighth Circuit precedent construing *Heck*'s footnote seven to eschew the fact-based approach); *Wallace v. Smith*, 145 Fed. Appx. 300, 301-02, 2005 U.S. App. LEXIS 16101, at *2-5 (11th Cir. 2005) (unreported) (reaffirming prior Eleventh Circuit precedent construing *Heck*'s footnote seven to eschew the fact-based approach).

The decision below creates a conflict between federal and state courts in New Jersey. In *Freeman v. State*, 347 N.J. Super. 11, 788 A.2d 867 (N.J. Super. Ct. App. Div.), *certif. denied*, 172 N.J. 178, 796 A.2d 895 (2002), the Appellate Division of the Superior Court of New Jersey held that the accrual of a *§ 1983* cause of action for an unlawful search is not delayed although evidence unlawfully derived from the search was integral to convicting the plaintiffs at their criminal trial. The Supreme Court of New Jersey has not addressed the issue, and *Freeman* is binding precedent in the trial courts of New Jersey. *Reinauer Realty Corp. v. Borough of Paramus*, 34 N.J. 406, 415, 169 A.2d 814, 891 (1961) (a trial judge is

"privileged to disagree with the pronouncements of appellate courts [but] the privilege does not extend to non-compliance"). The variance between federal and state-court decisions means that plaintiffs may forum-shop to utilize the court, federal or state, that will allow their claims to proceed.

The decision below negatively impacts upon federal-state comity interests by potentially requiring district courts to intrude into the files of state prosecutors and to review state-court records in order to determine whether doctrines such as independent source, inevitable discovery, or harmless error might have remedied the introduction of allegedly tainted evidence. The intrusion may be particularly acute if the criminal trial has not yet occurred. Most circuits courts have expanded the *Heck* delayed-accrual rule to encompass not only existing convictions, but also pending criminal charges, and to delay accrual of applicable causes of action until the charges are dismissed or resolved in favor of the *§ 1983* plaintiff. *Covington v. City of New York*, 171 F.3d 117, 124 (2d Cir.), *cert. denied*, 528 U.S. 946 (1999); *Smith v. Holtz*, 87 F.3d 108 (3d Cir.), *cert. den. sub nom. Wambaugh v. Smith*, 519 U.S. 1041 (1996); *Shamaeizadeh v. Cunigan*, 182 F.3d 391, 397-98 (6th Cir.), *cert. denied*, 528 U.S. 1021 (1999); *Washington v. Summerville*, 127 F.3d 552, 556 (7th Cir. 1997), *cert. denied*, 523 U.S. 1073 (1998); *Harvey v. Waldron*, 210 F.3d 1008, 1014 (9th Cir. 2000); *Beck v. City of Muskogee Police Dep't*, 195 F.3d 553, 557 (10th Cir. 1999); *Uboh v. Reno*, 141 F.3d 1000, 1006-07 (11th Cir. 1998).

Thus, plaintiffs facing criminal charges in circuits requiring the fact-based inquiry might utilize the delayed-accrual rule as a discovery mechanism to learn facts about the evidence in the prosecutor's possession. Recognizing the difficulties of conducting the fact-based inquiry when it is applied to pending untried criminal charges, the Sixth Circuit has altogether foreclosed the inquiry in the case of untried charges and has held that accrual is automatically delayed at least until the criminal charges are resolved. *Shamaeizadeh*, *supra*, 182 F.3d at 398-99. This result simplifies the litigation

and serves the interests of federal-state comity but cannot be what this Court intended in *Heck*'s footnote seven even if a fact-based inquiry is proper.

On the other hand, the Fifth Circuit, unlike most circuits, has not explicitly expanded the *Heck* delayed-accrual rule to encompass pending criminal charges; but, having adopted the fact-based approach, the Firth Circuit recognizes that if the plaintiff is convicted in the forthcoming criminal trial, then the fact-based approach may retroactively delay the accrual of his or her pending Fourth Amendment claim of unlawful search. *Mackey v. Dickson*, 47 F.3d 744, 746 (5th Cir. 1995). Because accrual will be "difficult to determine" until the criminal proceedings are complete, the Fifth Circuit has directed district courts to stay *§ 1983* proceedings "until the pending criminal case has run its course." *Ibid.* This result serves federal-state comity interests, but it both delays and enhances uncertainty as to whether accrual has taken place.

The decision below, requiring a fact-based inquiry to determine whether a cause of action has accrued, effects uncertainty in determining the date of accrual. The uncertainty is injurious to both plaintiffs and defendants:

> On a human level, uncertainty is costly to all parties. Plaintiffs may be denied their just remedy if they delay in filing their claims, having wrongly postulated that the courts would apply a longer statute. Defendants cannot calculate their contingent liabilities, not knowing with confidence when their delicts lie in repose.
>
> [*Wilson, supra*, 471 U.S. at 275 n. 34].

The uncertainty about the date of accrual unwisely encourages plaintiffs to file prophylactic complaints to avoid the expiration of the statute of limitations.

Neither the decision below nor any of the circuit decisions adopting the fact-based approach has taken into account recent statements of this Court suggesting that *Heck*'s footnote seven should be afforded an expansive rather than a narrow interpretation. In *Nelson v. Campbell*, 541 U.S. 637 (2004), this Court stated:

> [W]e were careful in *Heck* to stress the importance of the term "necessarily." For instance, we acknowledged that an inmate could bring a challenge to the lawfulness of a search pursuant to *§ 1983* in the first instance, even if the search revealed evidence used to convict the inmate at trial, because success on the merits would not "*necessarily* imply that the plaintiff's conviction was unlawful." 512 U.S., at 487, n. 7 (noting doctrines such as inevitable discovery, independent source, and harmless error). To hold otherwise would have cut off potentially valid damages actions as to which a plaintiff might never obtain favorable termination -- suits that could otherwise have gone forward had the plaintiff not been convicted.
>
> [*Id.*, at 647 (emphasis in the original)].

The accrual of *§ 1983* claims is delayed more often by the fact-based approach adopted by the majority opinion below than by the categorical approach urged by the dissenting opinion below. The fact-based approach is inconsistent with the goal not to "cut off potentially valid damages actions as to which a [convicted] plaintiff might never [otherwise] obtain favorable termination." *Ibid.*

Petitioners submit that the decision below misconstrues *Heck*'s footnote seven and is contrary to important policy goals and federal-state comity interests. But whether the decision is or is not correct, this Court should grant the writ on both questions presented to resolve the circuit split and the confusion that courts have encountered in construing *Heck*'s footnote seven.

B. This Court Should Grant the Writ on the First Question Presented to Resolve Whether *Heck*'s Delayed-Accrual Rule Applies to *§ 1983* Claims that are not Cognizable in Habeas Corpus.

In light of recent decisions by this Court suggesting that *Heck*'s delayed-accrual rule does not apply to *§ 1983* claims that are not cognizable in habeas corpus, clarification of *Heck*'s footnote seven should include resolution of whether, independent of the analysis advanced in footnote seven, delayed accrual is proper for the type of *§ 1983* claim that was the subject of footnote seven - Fourth Amendment claims of unlawful search. Although habeas corpus claims may be premised on a variety of constitutional violations, they may not be based upon violations of the Fourth Amendment "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim." *Stone v. Powell*, 428 U.S. 465, 482 (1976). This Court should grant the writ on the first question presented because it seeks clarification of *Heck*'s footnote seven for respondent Gibson's claim of unlawful search, which is not cognizable in habeas corpus.

The *Heck* delayed-accrual rule derived in part from the need to harmonize the procedural requirements of habeas corpus with those of *42 U.S.C. § 1983* and to ensure that a prisoner must seek habeas relief before prosecuting a *§ 1983* claim that would, if successful, imply the invalidity of his or her conviction or sentence. *Heck*, *supra*, 512 U.S. at 480-82. In *Spencer v. Kemna*, 523 U.S. 1 (1998), five Justices of this Court endorsed the proposition that the unavailability of habeas relief permits a *§ 1983* action to accrue regardless of whether

the success of the action would necessarily imply the invalidity of the conviction or sentence. Justice Souter, writing for four members of the Court, stated in a concurrence that "a former prisoner, no longer in custody, may bring a *§ 1983* action establishing the unconstitutionality of a conviction or confinement without being bound to satisfy a favorable-termination requirement that it would be impossible as a matter of law for him to satisfy." 523 U.S. at 21 (Souter, J., concurring; internal quotations omitted). Justice Stevens, in dissent, noted that "given the Court's holding that petitioner does not have a remedy under the habeas statute, it is perfectly clear, as Justice Souter explains, that he may bring an action under *42 U.S.C. § 1983*." *Id.*, at 25 n. 8 (Stevens, J., dissenting). See also *Muhammad v. Close*, 540 U.S. 749, 752 n. 2 (2004) ("Members of the Court have expressed the view that unavailability of habeas for other reasons may also dispense with the *Heck* requirement.").

Whether *Heck* now applies to claims not cognizable in habeas corpus has troubled circuit courts. *Nonnette v. Small*, 316 F.3d 872, 875-77 (9th Cir. 2002) (relying upon *Spencer* to hold that in certain limited cases, *Heck* does not apply to a *§ 1983* claim if habeas relief is unavailable). *cert. denied*, 540 U.S. 1218 (2004); *Huang v. Johnson*, 251 F.3d 65, 75 (2d Cir. 2001) (discussing *Heck* and *Spencer* and concluding that a *§ 1983* action challenging denial of credit for time served in pre-trial incarceration was not barred by *Heck* because the incarceration had been fully served and habeas was unavailable); *Shamaeizadeh v. Cunigan*, 182 F.3d 391, 396 n. 3 (6th Cir.) (noting that *Spencer* casts doubt upon whether *Heck* applies to prisoners no longer incarcerated for whom habeas relief is not available), *cert. denied*, 528 U.S. 1021 (1999); *Carr v. O'Leary*, 167 F.3d 1124, 1127 (7th Cir. 1999) (State will not be relieved of waiver of *Heck* defense because *Heck* does not appear to apply to plaintiff challenging loss of good-time credits after release from prison, when habeas is unavailable). Noting that *Stone v. Powell*, 428 U.S. 465 (1976), forecloses habeas relief for Fourth Amendment claims of unlawful search, the dissenting opinion below "doubt[ed]

that [this] Court had Fourth Amendment claims in mind when it spoke [in *Heck*] of claims that would necessarily imply the invalidity of a conviction or sentence." (App., infra, 17a; internal quotations and internal brackets omitted).

Petitioners endorse the reasoning of the dissenting opinion below. Even if, in general, *Heck*'s footnote seven should be construed to require a fact-based inquiry, no fact-based inquiry is proper for claims of Fourth Amendment unlawful search because these claims are not cognizable in habeas corpus and these claims accrue even if, when successful, they necessarily imply the invalidity of the conviction or sentence. But in any event, this Court should grant the writ on the first question presented so as to resolve this issue and provide the clarification that the divided circuit courts need in construing and applying *Heck*'s footnote seven to *§ 1983* claims that are not cognizable in habeas corpus.

C. This Court Should Grant the Writ on the Second Question Presented to Provide Clarification in Applying *Heck*'s Footnote Seven to Claims as to Which the Absence of Habeas Corpus Relief Cannot Independently Bar *Heck*'s Delayed Accrual.

The second question presented asks whether a *§ 1983* plaintiff's claim that the police selectively enforced the laws against plaintiff in violation of the Equal Protection Clause is subject to the *Heck* delayed-accrual rule because the enforcement led to the discovery of evidence used to convict the plaintiff at his or her criminal trial. Petitioners have not argued and do not now argue that Equal Protection selective-enforcement claims are not cognizable in habeas corpus, and petitioners are unaware of any decision adopting the rationale of *Stone v. Powell*, 428 U.S. 465 (1976), to Equal Protection claims of selective enforcement. The second question affords this Court the opportunity to clarify *Heck*'s footnote seven when it is extended to claims as to which the absence of habeas corpus relief cannot independently bar *Heck*'s delayed accrual.

Cf. *Heck*, *supra*, 512 U.S. at 480 n. 2 (this Court will not consider arguments against delayed accrual that were not raised by the petitioner).

A subsidiary issue raised by the second question is whether it implicates *Heck*'s footnote seven. The decision below held that "a successful claim of selective enforcement under the Fourteenth Amendment Equal Protection Clause would have necessarily invalidated Gibson's conviction" (App., *infra*, 22a) rather than merely have resulted in suppression of the discovered evidence. On this holding the decision below concluded that the construction of *Heck*'s footnote seven is not implicated in respondent Gibson's selective enforcement claim. *Ibid.* The reasoning of the decision below was flawed, and this Court should grant the writ on the second question presented to determine whether any remedy greater than suppression is proper for Equal Protection claims of selective enforcement.

This Court in *United States v. Armstrong*, 517 U.S. 456, 461 n. 2 (1996), left open as an unresolved issue "whether dismissal of the indictment, or some other sanction, is the proper remedy if a court determines that a defendant has been the victim of [selective] prosecution on the basis of his race." See also *United States v. Chavez*, 281 F.3d 479, 486-87 (5th Cir. 2002) ("Neither the Supreme Court nor our Court has ruled that there is a suppression remedy for violations of the Fourteenth Amendment's Equal Protection Clause, and we do not find it necessary to reach that issue here.") The second question presented raises the simpler issue whether any remedy greater than suppression is proper if a court determines that a defendant has been the victim of selective enforcement rather than selective prosecution. Because this issue is narrower and simpler than the issue left unresolved in *Armstrong*, this Court may wish to resolve it first. Cf. *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 488 n. 10 (1999) (expressing preference in Equal Protection selective-treatment cases to resolve "narrower" rather than more general constitutional issues); *United States v. Hare*, 308 F. Supp. 2d 955, 961 n.2 (D. Neb. 2004) ("there is little or no federal

authority for imposing the remedy of dismissal or suppression [based upon the defendants' contention that] the state trooper violated the defendants' equal protection and travel rights. Like [the magistrate judge], I do not reach this question, although it is an issue which cries out for resolution by the appellate courts.").

The decision below correctly understood that respondent Gibson's complaint alleged at most a claim of selective enforcement rather than selective prosecution of the drug laws. (App., *infra*, 20a-22a). This Court concluded in *Whren v. United States*, 517 U.S. 806, 813 (1996), that "the Constitution prohibits selective enforcement of the law based on considerations such as race" and that a vehicular stop may comply with the Fourth Amendment and yet violate the Equal Protection Clause if it was motivated by an impermissible racial animus but for which the stop would not have occurred. This Court also held in *Armstrong* that an accused does not state an Equal Protection claim for selective prosecution unless he or she can prove "that similarly situated individuals of a different race were not prosecuted." *Armstrong*, *supra*, 517 U.S. at 465.

Like respondent Gibson, criminal defendants alleging that drugs were found as a consequence of law enforcement officers' stopping their vehicles because of membership in a constitutionally protected class do not meet the *Armstrong* standard for an Equal Protection claim of selective prosecution of the drug laws because "similarly situated individuals" outside the class who are found with drugs in their vehicles are inevitably prosecuted. Thus, like respondent Gibson, these criminal defendants state at most a claim that they suffered selective prosecution of the traffic laws, although the drugs may have been discovered as the result of *Whren*-type selective enforcement. *United States v. Barlow*, 310 F.3d 1007, 1010 (7th Cir. 2002) ("Barlow complains not of selective prosecution, but of racial profiling, a selective enforcement tactic."), *cert. denied*, 538 U.S. 1066 (2003); *United States v. Avery*, 137 F.3d 343, 353-54 (6th Cir. 1997) (setting forth

elements of selective enforcement without the requirement that similarly-situated persons were not prosecuted).

Courts have noted but failed to resolve whether there are distinctions between selective enforcement and selective prosecution and the remedies for each. *Jones v. Sterling*, 110 P.3d 1271, 1275 n.3 (Ariz. 2005) (noting that this Court has not determined whether dismissal of the indictment or some other sanction is the proper remedy for selective prosecution, and similarly declining to determine whether dismissal or some other sanction is the proper remedy for selective enforcement of the drug laws based upon racial profiling); *Bryan v. City of Madison*, 213 F.3d 267, 276-77 (5th Cir. 2000) (discussing "selective enforcement" and "selective prosecution" and failing to note a distinction), *cert. denied*, 531 U.S. 1145 (2001); *State v. Ballard*, 331 N.J. Super. 529, 540, 752 A.2d 735, 740 (N.J. Super. Ct. App. Div. 2000) ("We need not, at this juncture, consider whether there is any difference with respect to a claim of selective enforcement by arresting officers and one involving selective prosecution by the State or prosecuting attorney. We reserve for future development any differences in remedy."). In the criminal context, the United States has advanced the argument "that suppression is not a remedy for an equal protection violation" whatever the basis for the claim. *United States v. Pollard*, 209 F. Supp. 2d 525, 538 (D.V.I. 2002), *rev'd on other grounds*, 326 F.3d 397 (3d Cir.), *cert. denied*, 540 U.S. 932 (2003).

The decision below, holding that dismissal of the criminal charges rather than some lesser sanction such as suppression of evidence is the proper remedy for claims of selective enforcement, creates a conflict between federal and state courts in New Jersey. The Supreme Court of New Jersey has held that the proper sanction is suppression of the evidence that is the result of selective enforcement. *State v. Segars*, 172 N.J. 481, 492-93, 799 A.2d 541, 548-49 (2002) ("Once it has been established that selective enforcement has occurred" the fruits thereof "will be suppressed" in the interest of "deterrence of impermissible investigatory behavior and maintenance of the

integrity of the judicial system"). Even prior to the Supreme Court of New Jersey's opinion, no state court in New Jersey had imposed any remedy greater than suppression. *State v. Ballard*, 331 N.J. Super. 529, 540, 752 A.2d 735, 740 (N.J. Super. Ct. App. Div. 2000) (raising but declining to resolve the issue); *State v. Soto*, 324 N.J. Super. 66, 83, 734 A.2d 350, 360 (N.J. Super. Ct. Law Div. 1996) (court will suppress evidence if it finds "an officially sanctioned or de facto policy of targeting minorities for investigation and arrest").

As the district court in this case understood (App., *infra*, 66a), the proper remedy for selective enforcement is at most suppression, and the decision below erred in concluding that dismissal of the charges rather than some lesser sanction such as suppression of the drugs would have been the proper remedy for respondent Gibson's Equal Protection claim at his criminal trial. The government should be permitted to prosecute a criminal matter, even one originating from selective enforcement in violation of the Equal Protection Clause, so long as the prosecutor has untainted evidence or so long as it was inevitable that untainted evidence would have been discovered. See *United States v. Pollard*, 209 F. Supp. 2d 525, 538 (D.V.I. 2002) (suppression of evidence obtained in contravention of defendant's equal protection rights would be viable sanction because sanction would fully comport with objective of the exclusionary rule as judicially created remedy designed to safeguard rights generally), *rev'd on other grounds*, 326 F.3d 397 (3d Cir.), *cert. denied*, 540 U.S. 932 (2003).

This Court should grant the writ on the second question presented and clarify whether any remedy greater than suppression of evidence at the defendant's criminal trial is proper for a claim that selective enforcement of the laws in violation of the Equal Protection Clause led to the discovery of inculpatory evidence. This Court should also grant the writ on the second question presented and resolve whether a *§ 1983* plaintiff's claim that the police selectively enforced the laws against the plaintiff in violation of the Equal Protection Clause is subject to delayed accrual because the enforcement led to the

discovery of evidence used to convict the plaintiff at his or her criminal trial. Because no remedy greater than suppression is proper for a claim of selective enforcement, resolution of *Heck*'s delayed-accrual rule in this context would resolve the circuit split concerning *Heck*'s footnote seven for claims as to which the absence of habeas corpus relief cannot independently bar *Heck*'s delayed accrual.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted on both of the questions presented.

Respectfully submitted,
PETER C. HARVEY
Attorney General of New Jersey

Patrick DeAlmeida
Assistant Attorney General
Larry R. Etzweiler*
Senior Deputy Attorney General
Robert P. Shane
Deputy Attorney General
*Counsel of Record

R.J. Hughes Justice Complex
P.O. Box 112
Trenton, New Jersey 08625
(609) 633-7786

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